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IN THE

Supreme Court of the United States

October Term, 1968.

No. 810

HARRY CONRAD MYERS and CHLOE MYERS individually and as parents and natural guardians for CATHARINE ANNE MYERS, and ROBERT A. KOLB and FRANCIS A. WECKENMAN as executors and trustees of the will of IDA MYERS HARRIS, Deceased,

Petitioners,

v.

ABEL K. HARRIS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

WALTER PHIPPS, JR.,
312 Fayette Street,
Conshohocken, Pa. 19428
Attorney for Respondent,
Abel K. Harris.

International, 711 So. 10th St., Phila., Pa. 19147—Tel. BA 7-8711 Area Code 215

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COUNTERSTATEMENT OF CASE.

Petitioners' statement that the trial court did not believe the witness Campbell is not supported by the record. On the contrary, the trial judge in reporting the factual background of the case and what the husband's evidence established quoted verbatim Campbell's relevant testimony regarding the misrepresentations (Appendix B to Petition, pp. 18, 19). Petitioners' quotation from the lower court's opinion allegedly showing that the trial judge did not believe Campbell is taken out of context and is merely part of the court's final summary conclusion after reasoning from all of the evidence, certain principles of law and the arguments of counsel (Appendix B to Petition, p. 24).

The trial judge's findings were never confirmed by the Orphans' Court en banc.

In their "Counterstatement of Questions Involved" in their brief before the Pennsylvania Supreme Court, petitioners listed only the following questions:

> "1. May the attorney for the intending husband who draws an antenuptial agreement and supervises the execution thereof, upon the death of the wife, enter into a contingent fee agreement with the surviving husband to set aside the agreement?
>
> 2. In such case may said attorney on the eve of the trial withdraw as attorney of the surviving husband thereby become competent to testify?
>
> 3. May the intending husband whose attorney prepared an antenuptial agreement which recited that the nature and extent of the holdings of real and personal property of each was disclosed to the other, after the wife's death elect against her will when there is no fraud or overreaching?"

Petitioners first raised the question of deprivation of due process under the Fourteenth Amendment in the Supreme Court of Pennsylvania in their Petition for Reargument which was denied without opinion.

ARGUMENT IN OPPOSITION.

Point I.

The Constitutional Question Was Not Properly Presented For Decision in the Supreme Court of Pennsylvania.

The first mention of the federal constitution in this case in the Supreme Court of Pennsylvania was in petitioner's Petition for Reargument.

In their "Counterstatement of Questions Involved" in their brief before the Pennsylvania Supreme Court, petitioners listed only the following questions:

> "1. May the attorney for the intending husband who draws an antenuptial agreement and supervises the execution thereof, upon the death of the wife, enter into a contingent fee agreement with the surviving husband to set aside said agreement?
>
> 2. In such case may said attorney on the eve of the trial withdraw as attorney for the surviving husband and thereby become competent to testify?
>
> 3. May the intending husband whose attorney prepared an antenuptial agreement which recited that the nature and extent of the holdings of real and personal property of each was disclosed to the other, after the wife's death elect against her will when there is no fraud or overreaching?"

In their Petition for Reargument petitioners, without explanation or attempt to show the application of the hereinafter stated constitutional provision to the case at hand, gratuitously inserted the following paragraph:

> "Section 1 of Amendment XIV to the Constitution of the United States provides, inter alia, that 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction equal protection of the laws'."

The Supreme Court of Pennsylvania dismissed the Petition for Reargument without an opinion. It is well settled that the Supreme Court of the United States will not consider questions that were not properly presented for decision in the highest court of the State. Ordinarily it will not consider contentions first made in a petition to the State Court for a re-hearing where the petition is denied without more. *Citizen's National Bank v. Durr,* 257 U. S. 99, 106.

Point II.

No Substantial Federal Question Is Involved in This Proceeding.

A. Petitioners Predicate Their Claim of Denial of Due Process Upon the False Premise That the Appellate Court Made an Independent Finding of a Basic Fact Contrary to the Trial Judge.

Petitioners predicate their entire claim of deprivation of due process solely upon the construction which they would place upon the opinion of the trial court as opposed to the construction placed thereon by the appellate court. The appellate court did not substitute its finding of fact regarding misrepresentations for that of the trial judge. On the contrary, the appellate court properly construed

the opinion of the trial court as having found that the misrepresentations had been made. The essential question here presented to your Honorable Court is whether the appellate court properly interpreted the effect of the decision of its lower court. "It is elementary and needs no citation of authority to show that due process clause of Fourteenth Amendment does not control methods of state procedure or give jurisdiction to this court to review mere errors of law alleged to have been committed by a state court in the performance of its duties within the scope of its authority concerning matters non-federal in character." *McDonald v. Oregon, etc. Nav. Co.,* 233 U. S. 665. The Constitution does not guarantee that the decisions of state courts shall be free from error, or require that its pronouncements shall be consistent. *Worcester County Trust Co. v. Riley,* 302 U. S. 292.

Nonetheless, the appellate court did reasonably and properly interpret the lower court's opinion. The fair reading of the trial judge's entire opinion indicates that he did, in fact, find that the misrepresentations regarding the wife's assets were made. In his opinion (Appendix B to Petition, p. 18) the trial judge states, "The husband's evidence establishes . . ." and then goes on to recite certain facts and to quote the witness Campbell's testimony (Appendix B to Petition, p. 19) regarding his interrogation of the parties concerning their assets. On page 20 the trial judge states, *"As to what further occurred on April 21, 1959, at the second meeting in Mr. Campbell's office when the present agreement was executed,* Mr. Campbell testified that he read the agreement to the parties and 'I again mentioned that I think it would be better if there was some kind of list attached but I said—I told them that if they don't want it attached at least we should have some idea of what was what and I asked Abel Harris what his total

assets were including the real estate and he said twenty thousand dollars, and I looked at her and I said, "Mrs. Myers, can you give me some idea?" and she said, "About twice that much." I didn't press the point on that and they executed the agreement'." On page 23, the trial judge, continuing his narration of the established facts, states, "The record *also establishes* . . ." On page 24, the trial judge, in finding as a fact favorable to petitioners that the husband never showed any interest or made any inquiry regarding his wife's assets while their joint income tax returns were being prepared, used the very same phrase which he used regarding Campbell's evidence, to wit, "These witnesses *testified that* . . ."

The petitioners' argument that the trial judge expressly and specifically disbelieved the witness Campbell and that the appellate court substituted its assessment of the witness's credibility for that of the hearing judge and found a basic fact opposite to that of the hearing judge is not supported by the facts and is not presented to your Honorable Court by the record in this case. The trial court never passed upon the credibility of the witness Campbell. No such principle of law is established by the decision of the Pennsylvania Supreme Court. The appellate court in writing its decision obviously abstracted the relevant facts from the lower court's opinion even to the extent of using the word "testified" in exactly the same context that the trial judge used it when discussing evidence regarding misrepresentations. The trial court's opinion (Appendix B to Petition, pp. 18, 19, 20) reciting what the husband's evidence established quoted verbatim the testimony of the witness Campbell on the subject of the misrepresentations. What point would there have been for the trial court to quote this testimony if it did not believe it? Nowhere does the trial court say that it did not

believe this testimony. Nowhere does the trial court say that the witness was not credible or that the misrepresentations were not made. Nowhere does the appellate court state that it is making an independent finding of fact. The Supreme Court of Pennsylvania was justified in construing the opinion of the trial judge to have found that the misrepresentations were made by the decedent wife. The United States Supreme Court will not review decisions of state courts which rest upon adequate non-federal grounds. *Young v. Ragan*, 337 U. S. 235. The construction or interpretation placed by an appellate court upon an opinion of a lower state court in this context does not raise a substantial federal question.

B. No Denial of Due Process Is Involved in an Appellate Court Reviewing Conclusions of Ultimate Fact or of Law Drawn by One of Its Subordinate Trial Courts.

No novel principle of law in Pennsylvania is established by the decision in this case. No right guaranteed by the Federal Constitution has been violated. The petitioners mistakenly contend that the trial court's summary statement near the end of his opinion (Appendix B to Petition, p. 24), to wit, "*After careful consideration of the foregoing and of all the other evidence presented and the able arguments of counsel, the court finds that the estate has clearly established that the antenuptial agreement was fair, equitable and reasonable in view of all the surrounding circumstances, that it was entered into voluntarily and with fair and adequate knowledge of the facts, and in the utmost good faith on the part of the decedent and that it was valid and subsisting on the date of her death.*", is an unchallengable, unreviewable, irreversible and constitutionally sanctified finding of fact. It has long been the

law in Pennsylvania that a chancellor's conclusions, whether of law or of ultimate fact, are no more than his reasoning from the underlying facts and are reviewable. Where the decision or determination of a case depends upon the inferences and deductions which are to be drawn from the facts, an appellate court may deduce these for itself whatever may have been the findings below. *Jac's Estate,* 355 Pa. 137, 143. Where a finding of fact is simply a deduction from other facts reported by the tribunal under review, and the ultimate fact in question is purely the result of reasoning, the appellate court is competent to judge its correctness and will draw its own conclusions from the facts as reported. *Dorrance Estate,* 309 Pa. 151, *cert. denied,* 287 U. S. 660. No greater weight is given by an appellate court to such findings than to findings of law. *Fidelity Trust Co. v. Union National Bank,* 313 Pa. 467, *cert. denied,* 291 U. S. 680. The trial court arrived at the aforementioned summary conclusion by the process of reasoning after considering several circumstances and principles of law which it apparently believed mitigated the effect of the misrepresentations. It is significant, for example, that the trial court concluded that the agreement was entered into with fair and *adequate* knowledge of the facts. The trial court did not say the agreement was entered into with *full* knowledge of the facts. The lower court's conclusion that the knowledge of the facts was *adequate* may well have been predicated upon its statement (Appendix B to Petition, p. 21) of the principle of law to the effect that "It is not necessary that the husband have *exact* knowledge as to the worth of the wife's property". The trial court may well have reasoned that the lack of full disclosure was cured by the other circumstances and principles of law discussed in its opinion.

C. No Denial of Due Process Is Involved in an Appellate Court Making an Independent Finding of Fact.

Although the appellate court did not make an independent finding of fact, petitioners' argument that it would be violative of due process for an appellate court to do so is without merit. There is no constitutional proscription against an appellate court making a finding of fact in a non-jury civil case. The three federal cases cited by petitioners in their brief (Renault, Sieracinski & Kawietzke, Petition, p. 8) are all jury cases and not applicable here. Nor is this a novel procedure in Pennsylvania. It is well settled and long established in Pennsylvania that on appeal from a trial of an action at law without a jury, the appellate court may consider elements not considered below and make its own findings. *General Contract Purchase v. Bitomski*, 102 Pa. Super. Ct. 266, 156 A. 727 (1936); *Re McCann*, 104 Pa. Super. Ct. 196, 159 A. 334 (1931); *Innes v. Nanticoke City School District*, 342 Pa. 433, 20 A. 2d 225 (1941); *Commercial M Co. etc. v. Waters*, 280 Pa. 177, 180 (1924). Also, the findings of the trial judge in the instant case were not confirmed by the Orphans' Court en banc and are therefore entitled to less weight than they otherwise would have been. *Appeal of Rogers*, 361 Pa. 51; 62 A. 2d 900.

D. The Opinion of the Appellate Court Does Not Establish Any New Principle of the Law of Evidence, or Reaffirm Any Previously Existing Principle or Rule Repugnant to the Constitution.

The holding in this case by the Supreme Court of Pennsylvania does not, as petitioners contend, establish or reduce the quantum or quality of proof required to estab-

lish a fact or to shift the burden of going forward with the evidence upon the other side. The principle or rule of law, *that once misrepresentations have been proved* by the person attacking the antenuptial agreement, it will be presumed that the contract was entered into in reliance upon these misrepresentations and the burden to prove otherwise is upon the decedent's estate, as set forth in the opinion, is not new in Pennsylvania or an unreasonable procedural rule. It was enunciated as early as 1950 in *McClellan's Estate,* 365 Pa. 401, 75 A. 2d 595, and antedates the agreement in the case sub judice. This principle is not repugnant to the controlling rules and decisions of the United States Supreme Court or the Constitution.

In the case at hand the petitioners were given a full hearing before a court of competent jurisdiction, had the opportunity to cross-examine witnesses, to present evidence, and were not denied any constitutionally protected right. There was no deprivation of due process.

CONCLUSION.

Petitioners have not alleged or shown any manner in which the litigation was determined which was repugnant to the controlling rules and decisions of your Honorable Court or the Constitution, and no substantial federal question is involved. Therefore, your Honorable Court should deny certiorari.

Respectfully submitted,

WALTER PHIPPS, JR.,
312 Fayette Street,
Conshohocken, Pa. 19428
Attorney for Respondent,
Abel K. Harris.